

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)	
)	
Satellite Delivery of Network Signals)	CS Docket No. 98-201
to Unserved Households for)	RM No. 9335
Purposes of the Satellite Home)	RM No. 9345
Viewer Act)	
)	
Part 73 Definition and Measurement)	
of Signals of Grade B Intensity)	

**INITIAL COMMENTS OF PRIMETIME 24 JOINT VENTURE IN
RESPONSE TO NOTICE OF PROPOSED RULEMAKING**

PRIMETIME 24 JOINT VENTURE

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**INITIAL COMMENTS OF PRIMETIME 24 JOINT VENTURE IN
RESPONSE TO NOTICE OF PROPOSED RULEMAKING**

PrimeTime 24 Joint Venture ("PrimeTime 24") hereby submits these initial comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") concerning the definition under the Satellite Home Viewer Act ("SHVA") of "an over the air signal of grade B intensity" as "receive[d] through the use of a conventional outdoor rooftop receiving antenna." 17 U.S.C. §119(d)(10).¹ PrimeTime 24 endorses the Commission's objective to "ensure that as many consumers as possible can receive a broadcast network signal consistent with the intent of the SHVA," NPRM, ¶ 15, a goal that is in imminent jeopardy in light of the preliminary injunction issued by the United States District Court for the Southern District of Florida. To achieve the Commission's objective and prevent the mass terminations of network service that will otherwise result from the injunction, the Commission should:

¹ PrimeTime 24 previously submitted comments in support of the Emergency Petition for Rulemaking filed by the National Rural Telecommunications Cooperative (on September 4, 1998)("PrimeTime 24's NRTC Comments") and in support of the Petition for Declaratory Ruling and Rulemaking filed by EchoStar Communications Corporation (on September 25, 1998)("PrimeTime 24's EchoStar Comments"). Those comments are incorporated by reference herein.

(1) adopt "grade B" signal intensity levels for SHVA purposes that are more likely to provide modern television viewers with acceptable quality television pictures than the values currently in 47 C.F.R. § 73.683(a), which were developed during the infancy of television for the purpose of showing areas predicted to be served (with "passable" television pictures) on small black and white television sets;

(2) adopt a methodology that more accurately predicts whether these "grade B" signal levels are likely to be present at a particular household than the flawed Longley-Rice methodology employed by the District Court for the Southern District of Florida;

(3) adopt an on-site measurement procedure for SHVA purposes that more accurately measures the field strength at a particular household than the methodology specified in 47 C.F.R. § 73.686, recognizing that any reliable measurement technique will necessarily be costly; and

(4) recommend to Congress, as the Copyright Office has, that Congress adopt an interim, "commercial solution" to the SHVA controversy until "local-into-local" service is available, whereby households that are otherwise predicted to be ineligible can obtain distant network signals for an additional fee that would be paid to compensate the affected broadcasters.

In support of these comments, PrimeTime 24 submits the attached declaration of William Hassinger, an engineer and former assistant bureau chief (for engineering) of the Commission's Mass Media Bureau, and the declaration of James Dertouzos, an economist who was a principal expert witness on behalf of the Commission in defending the "must carry" rules in Turner Broadcasting Systems, Inc. v. Federal Communications Commission, 117 S. Ct. 1174 (1997).

I. BACKGROUND

A. PrimeTime 24.

PrimeTime 24 is the leading provider of network television programming to the direct-to-home ("DTH") market, and the only such provider not owned or controlled by cable television interests. PrimeTime 24 uplinks programming directly to consumers, or in the vast majority of cases, through distributors of DTH satellite programming. PrimeTime 24 and its distributors transmit the broadcasts of NBC, ABC, and CBS pursuant to a compulsory copyright license, and a national "FoxNet" feed pursuant to a license agreement, and pay a statutorily (or in the case of Fox, contractually) determined royalty fee to retransmit network television programming to satellite subscribers in unserved households as defined by SHVA.

B. The Lawsuits Against PrimeTime 24.

The National Association of Broadcasters ("NAB"), the four networks, and the affiliate associations of the four networks have jointly funded three lawsuits as part of their much publicized litigation campaign against PrimeTime 24: CBS, Inc. v. PrimeTime 24 Joint Venture, Civil Action No. 96-3650-CIV (S.D. Fla.)("the Miami case"); Cannan Communications, Inc. v. PrimeTime 24, No. 2-96-CV-086 (N.D. Tex.)("the Amarillo case"); and ABC, Inc. v. PrimeTime 24 Joint Venture, C.A. No. 1:97 CV 00090 (M.D. N.C.)("the Raleigh-Durham case").

The Amarillo case, which is limited to the Amarillo market, was brought in March, 1996 by a single NBC affiliate. ABC brought the Raleigh-Durham case (limited to that market) in February, 1997. The Miami case is nationwide in scope and was brought in December, 1996 by CBS, Fox, several CBS affiliates, and the CBS Television Affiliates Association.

On July 10, 1998, two days after the NRTC filed its Emergency Petition, the United States District Court for the Southern District of Florida issued a preliminary injunction in the Miami case.² This preliminary injunction presumptively prohibits PrimeTime 24 and its distributors from providing CBS and Fox network programming to any customer "within an area shown on Longley-Rice propagation maps, created using Longley-Rice Version 1.2.2 in the manner specified by the Federal Communications Commission . . . , as receiving a signal of at least a grade B intensity of a CBS or Fox primary network station." According to the court, the Commission has "specified" that the Longley-Rice model should be used to predict signal strength 30' in the air, with input parameters of 50% time variability, 50% location variability, and 50% confidence.³ This injunction presumptively bars the retransmission of network signals by satellite to new subscribers that are located within the specified Longley-Rice predicted Grade B area of a local CBS or Fox network affiliate and requires all subscribers in such areas activated by PrimeTime 24 on or after March 11, 1997 to be disconnected by February 28, 1999.⁴

To be sure, the preliminary injunction permits subscribers located within the specified Longley-Rice predicted grade B area of a station to receive network service via satellite if a signal

² CBS, Inc. v. PrimeTime 24 Joint Venture, Supplemental Order Granting Plaintiff's Motion for Preliminary Injunction, Civil Action No. 96-3650-CIV (S.D. Fla. July 10, 1998).

³ Of course, the Commission to date has never adopted any version of the Longley-Rice model for purposes of individual household eligibility determinations under SHVA.

⁴ The injunction originally required service terminations to be completed within 90 days of the court's Order, but, at the request of the parties, the court extended the date for compliance, which will enable the Commission to complete its rulemaking before any subscribers lose their service.

intensity test purportedly based on the Commission's field strength measurement methodology (see Section 73.686) shows the subscriber to receive less than a grade B intensity signal, or if the local affiliate grants a waiver. However, as the Copyright Office has noted, signal intensity tests are too expensive to be economically feasible. See Copyright Office Report at 123. Moreover, as set forth herein, there are serious technical problems with importing the Commission's existing field strength testing methodology geared to area measurements for purposes of individual SHVA household signal strength measurements. Thus, as a practical matter, the Longley-Rice model, used as described above, will in almost all instances be the conclusive determinant of subscriber eligibility.

As a direct result of the Miami court's preliminary injunction, therefore, hundreds of thousands of satellite subscribers throughout the United States face imminent termination of their CBS and Fox network services. This injunction has therefore caused a crisis for consumers across the country and in the satellite industry. Moreover, if the court enters a permanent injunction, then PrimeTime 24 may be required to terminate hundreds of thousands of additional subscribers because the permanent injunction requested by the plaintiffs is not limited to subscribers who signed up after March 11, 1997, and the Longley-Rice methodology endorsed by the Miami court leaves very limited areas in the United States that are not covered by some CBS (or Fox) predicted grade B area.

A trial on the plaintiffs' request for a permanent injunction was held in mid-August; the parties have submitted post-trial papers and the court has taken the matter under advisement.⁵

⁵ In the Raleigh-Durham case, ABC was granted summary judgment and obtained a permanent injunction requiring PrimeTime 24 to disconnect its ABC services from all subscribers located within the FCC predicted grade B contour of ABC's owned and operated Raleigh Durham station. This means that many subscribers that satisfy the Miami court's test -- and have a measured median field strength of less than the grade B value -- will not have any
(continued...)

II. SPECIFIC COMMENTS

A. The FCC Has Authority to Define a "Signal of Grade B Intensity" Received Through the Use of a "Conventional Outdoor Rooftop Receiving Antenna" for SHVA Purposes.

Under SHVA, an "unserved household" is one that (among other things) "cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with the network." 17 U.S.C. § 119(d)(10).

The Commission has correctly concluded that it has ample authority to define the term "an over-the-air signal of grade B intensity" as used in this statute. NPRM, ¶ 21.

The Commission has asked for comments on whether it has the authority to revise its Grade B rules specifically for SHVA purposes. NPRM, ¶ 22. The answer is unequivocally yes, for two reasons.

First, the Commission has never defined an "over-the-air signal of grade B intensity" as received "through the use of a conventional outdoor rooftop receiving antenna." See Declaration of William Hassinger, ¶ 6; Trial Testimony of Richard L. Biby (hereinafter "Biby Testimony"), attached as Exhibit A hereto, p. 818. Therefore it needs to adopt such a definition in the first instance, not revise an existing definition. Although the Commission suggests that "a signal of grade B intensity" is currently defined in Section 73.683(a) of its rules, that section does not in fact define the term. Rather, as the Commission recognizes, Section 73.683 defines the Commission's field

⁵(...continued)

access to the ABC network (unless they can subscribe to cable). In the Amarillo case, an NBC affiliate is seeking relief similar to that obtained by ABC. The Amarillo case was tried in November 1997 and remains under advisement by the court.

strength *contours*. NPRM, ¶¶ 4, 5; Hassinger Decl., ¶¶ 6, 7. And even if Section 73.683 does define a grade B intensity *signal*, it does not define a grade B intensity signal "*receive[d] through the use of a conventional outdoor rooftop receiving antenna*." 17 U.S.C. § 119(d)(10).

Indeed, as the Commission notes, the Grade B concept as traditionally understood "represents the [median] field strength of a signal 30 feet above the ground," NPRM, ¶ 4, which has nothing to do with a "conventional rooftop antenna" or actual reception of a signal by a household. As the NAB's expert, Robert du Treil, Jr., testified in the one of the lawsuits against PrimeTime 24, "the law makes mention of a conventional rooftop antenna. But ... as far as the availability of a Grade B signal, we speak to ... whether there is an ambient Grade B signal in the area.... The antenna itself really is irrelevant to that particular question." See PrimeTime 24 NRTC Comments, supra, note 1, Exhibit A (Tr. 459); see also id. at 460 (du Treil states that he doesn't understand the relevance of a conventional rooftop antenna); id. at 527 (du Treil states that an antenna is irrelevant to field strength). Harmonizing the concepts of a grade B intensity signal and reception of such a signal through the use of an over-the-air conventional rooftop antenna *requires* the Commission to adopt a definition for SHVA purposes.

Second, even if the Commission is not writing on a blank slate, it has the authority to develop a "revised" grade B standard for SHVA purposes. There is simply nothing in the language or legislative history of the Act to suggest that Congress intended irrevocably to tie the definition of a "grade B" signal for purposes of defining an "unserved household" under SHVA to the definition of a "grade B" signal for other purposes, such as defining a station's general predicted area coverage.

Absent such a suggestion, the Commission may surely "redefine" a grade B signal for SHVA purposes in a way that more accurately conforms to the intent of Congress to ensure that individual

households have access to quality television reception. Moreover, to have practical application in the SHVA context, a signal strength value alone is insufficient. One must know, among other things, how often the requisite signal must be present, how and where it is to be measured, how it ought to be predicted, and how signal degradation by factors such as interference and ghosting should be taken into account. Neither the language of SHVA, nor the present regulation, provides answers to these questions. These gaps in the statute must be filled in with "special" grade B rules for SHVA.

B. The Commission Should Define a "Signal of Grade B Intensity ... Received Through the Use of a Conventional Rooftop Antenna" as a Signal That is Adequate to Produce a Picture Acceptable to the Median Viewer in the 1990's When the Viewer Employs a Rooftop Antenna.

Any definition of a grade B intensity signal received through the use of a conventional rooftop receiving antenna should have two elements: a signal strength component, which if present and unimpaired is ordinarily expected to produce an acceptable quality picture, and a signal quality element, which takes into account other factors that may degrade picture quality, such as interference from undesired signals, electrical noise, ghosting, legal restrictions on antennas and antenna orientation. Hassinger Declaration, ¶ 13. A signal may be strong but "may be rendered unwatchable because by ghosting, excessive noise, [or] electrical interference." In the Matter of Implementation of the Cable Television Consumer Protection And Competition Act of 1992, 8 FCC Rcd 2965, ¶ 99 n. 298. If Congress had intended that signal strength alone would be determinative of eligibility, then the phrase "cannot receive, through the use of a conventional outdoor rooftop

antenna" would be superfluous. Id.⁶

1. The FCC Should Adopt Grade B Signal Strength Levels of at Least 67 dBu for Low VHF; 72 dBu for High VHF; and 81 dBu for UHF.

The Commission has noted that the present Grade B values "were designed to enable reception of a television picture that is acceptable to the median observer, 'assuming a receiving installation (antenna, transmission line, and receiver) considered to be typical of outlying or near-fringe areas).' Grade B service also assumes the absence of man-made noise or interference from other stations." NPRM, ¶ 27. The Commission now asks, "Has what constitutes a 'conventional outdoor rooftop receiving antenna' and the concept of the quality of service that viewers would consider acceptable changed since the Commission adopted the Grade B signal strength levels in the 1950s?" Id. It goes on to inquire, "Would these standards need modification so that the median observer would continue to find the service acceptable? For example, receivers may have improved,

⁶ An analogy might be drawn from the Commission's rules regarding the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992. The Cable Act requires a television station to deliver to a cable operator's principal headend a signal of -49dBm for VHF and -45dBm for UHF to be eligible for must-carry treatment. 47 U.S.C. § 534(h)(1)(B)(iii). The Commission has concluded that this "will generally result in a good quality television signal being received." Report and Order, In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1991, 8 FCC Rcd 2965, ¶ 100 (1993). However, even when a television station delivers a signal above the threshold, the Commission will deny a must-carry complaint on a case by case basis if the picture quality is unacceptable. E.g., In re Complaint of WRNN-TV Associates Ltd Partnership Against Cablevision Systems Corp., 13 FCC Rcd 12654 (1998)(denying must-carry complaint because station signal failed to meet minimum S/N ratio of 53 dB as set by the NCTA's Recommended Practices for Measurements on Cable Television Systems); In re Complaint of Northwest Indiana Public Broadcasting, Inc. Against Continental Cablevision of Northern Illinois, 12 FCC Rcd 4709 (1997)(denying must-carry complaint because station failed to deliver a signal with acceptable picture quality); cf. Notice of Proposed Rule Making, In the Matter of Carriage of the Transmission of Digital Television Broadcast Stations; Amendments to Part 76 of the Commission's Rules, 13 FCC Rcd 15092 (1998)("in the analog situation, issues involving signal strength, signal to noise ratios, and ghosting are the focus of concern").

or the assumptions regarding interference in outlying areas may no longer be valid. . . . We welcome comments, supported by evidence, regarding any claimed changes to the assumptions made in deriving the Grade B signal intensity." Id.

In fact, there is much evidence that the original planning factors developed in the early 1950s during the infancy of television are hopelessly out of date and inadequate to provide an acceptable television picture to the average viewer at the dawn of the third millennium. See Declaration of William Hassinger, ¶¶ 19-24; Engineering Statement of Hatfield and Dawson (accompanying Comments of SBCA). A principal defect in the planning factors is the signal (or carrier)- to- noise ratio that was assumed to provide an acceptable picture to the median viewer. In the early 1950's it was assumed that the median viewer found a "passable" picture on a small black and white television set to be acceptable, which corresponded roughly to a signal-to-noise ratio of 30 dB. See Robert A. O'Connor, "Understanding Television's Grade A and Grade B Service Contours," IEEE Transactions on Broadcasting, 139 (December 1968). One does not need a degree in engineering to understand that such a picture would not be acceptable to most viewers today. Viewers are much more critical in today's modern world of VCRs, large screen color televisions, and heavy television watching. Not only would viewers not find a "passable" picture acceptable today, their definition of what constitutes a passable picture is undoubtedly more critical today than it was nearly 50 years ago. Fifty years ago, consumers had no need to be able to read character-generator produced text (such as sports scores) or to record programming using a VCR. Moreover, as the Commission pointed out in updating its technical standards for cable television from the early 1970s:

[W]e recognize that the American household's typical television equipment has changed markedly since ... the early 1970s [when] most television households had a single television set, usually black and white, and VCRs were non-existent.... Today, however, some two

decades later, close to 70% of television households have VCRs, and the average number of television sets in a household is two. In addition, a significant number of television sets in use are now 26 inches or larger diagonally, and black and white sets are uncommon. Notably, signal degradation is more noticeable ... on larger and on color sets.

In the Matter of Cable Television Technical and Operational Requirements; Review of the Technical and Operational Requirements of Part 76, Cable Television, 7 FCC Rcd 2021, ¶ 27 (1992)(emphasis added).

The Commission's own signal-to-noise ratio for cable television provides an appropriate benchmark for the signal-to-noise ratio that should be applied to over-the-air viewers. In 1992, the Commission adopted a 43 dB signal-to-noise ratio for cable television. At the time, it explained:

The visual signal level to undesired noise ratio (C/N) is a key factor in the signal quality of a TV picture. The C/N is the level of the desired signal above the level of the undesired noise in the delivered picture. The higher the ratio, the better quality the picture. For example, a good NTSC television picture should have a C/N ratio of 43 dB or better. We believe this parameter is critical to the quality of the picture received by cable subscribers, and we reiterate that there is merit to the criticism that our standards in this regard need to be improved in order to assure provision of a high quality picture to cable subscribers.

Id., ¶ 37. There is no reason that satellite viewers should be entitled to a lower picture quality for their network signals than cable television subscribers.

Another significant defect in the planning factors from the 1950's is, as the Commission noted, the assumption that there is no environmental noise. The problem is not simply that, as Kalagian noted in 1977, the "assumption of 0 dB to overcome rural noise in ... rural areas [that used to characterize the grade B area] is probably no longer valid because of the increased number of high voltage power lines and motor vehicle traffic volume." NPRM, ¶ 27 n. 63 (internal quotations

omitted).⁷ The problem is also that for SHVA purposes it is inappropriate to assume that a household is necessarily located in an outlying or near-fringe area, as the planning factors assume for Grade B service. Accordingly, the planning factors should be adjusted to account for the ambient noise that is typical today for satellite dish users.

Making an adjustment for the signal-to-noise ratio, the ambient noise factor, and the antenna gain for UHF stations, leads to a conservative adjustment of the grade B figures to a minimum of : 67 dBu (low VHF), 72 dBu (high VHF), and 81 dBu (UHF).⁸ Hassinger Declaration, ¶¶ 19-24. The validity of such an adjustment of at least this magnitude is confirmed by empirical data from a study conducted by Neil Smith in the early 1970s, id., ¶¶ 25-34, and the Engineering Statement of Hatfield & Dawson.

In soliciting comments on adjusting the Grade B values, the Commission stated that "we believe that we cannot modify Grade B intensity so much that it effectively equals or exceeds Grade A signal intensity." NPRM, ¶ 28. The values suggested above would in fact approximate or exceed the current grade A contour values (which are 68 dBu for low VHF, 71 dBu for high VHF, and 74 dBu for UHF). However, the Commission is not constrained by the existing Grade A contour values.

⁷ As Kalagian then reported, preliminary studies had shown environmental noise was as much as 15-20 dB for "rural areas." Moreover, noise in urban areas and suburban areas of large population centers was 20-30 dB (for low VHF). Gary S. Kalagian, "A review of the Technical Planning Factors for the VHF Television Service," FCC, Office of Chief Engineer, Bulletin RS77-01 (March 1, 1977), p. 11.

⁸ As Hassinger notes, the selected values are conservative. Other adjustments to the planning factors would likely raise the selected values. Hassinger Declaration, ¶ 24; see also Engineering Statement of Hatfield & Dawson (noting that high end of range of revised planning factors, without adjustment for man-made noise, would exceed 70 dBu for low VHF, 76 dBu for high VHF, and 92 dBu for UHF).

for the simple reason that the proposed grade B values are for SHVA purposes. Neither the current Grade B contour standard nor the current Grade A contour standard need be affected. The Grade A and Grade B contours serve purposes other than predicting whether individual households can receive acceptable quality service and there is no reason why the contours must be adjusted for these other purposes. Moreover, to the extent that Grade A signal levels had any relevance to SHVA, then the same considerations that require adjusting the planning factors for the Grade B signal levels would also call for an adjustment of the Grade A values. When such an appropriate adjustment was made, the Commission's concerns would be allayed.⁹

C. The Commission Should Define a Predictive Model Which May Be Used To Determine Presumptive Eligibility For Satellite Home Viewer Act Purposes.

1. It is Essential that the Commission Define a Predictive Model that May Be Used to Determine Presumptive Eligibility for SHVA Purposes.

It is not economically feasible to carry out any regimen of testing at the household of every subscriber or potential subscriber as a precondition for Satellite Home Viewer Act "unserved household" eligibility. The cost of testing simply is too great. See Copyright Office Report at 123. Therefore, if the Commission's definition of "a signal of Grade B intensity" for SHVA purpose is to have any utility, and if any households are to be eligible to receive network programming by satellite under SHVA, there must be a method of making presumptive determinations of eligibility without the need to engage in individualized testing.

⁹ As Hassinger notes, the distinction between Grade A and Grade B service is not the quality of the picture, but in the probability of receiving a picture of the same (acceptable) quality, given various assumptions about household receiving systems and ambient noise. Hassinger Decl., ¶ 15.

2. The Commission Has the Authority to Adopt Such a Predictive Model

There can be no doubt that the Commission has the authority to adopt a model for use in making presumptive eligibility determinations. As the SBCA points out in its Comments neither the language of SHVA nor its legislative history suggests that Congress intended that only the results of actual testing were required to determine eligibility. Moreover, as Congress clearly knew when it enacted SHVA and referred in it to the Commission, the Commission has utilized predictive models and methods for many other purposes. See, e.g., 47 CFR §§ 73.313, 73.684.

3. The Predictive Model Should Be Used To Make A Specific Prediction At The Household In Question, Not A General Prediction About An Area.

In defining a predictive model, the Commission must recognize and take into account the critical distinction between the Satellite Home Viewer Act and other contexts in which predictions of television station coverage must be made by means of a predictive model. In other contexts, such as the siting of stations or the determination of the general availability of service to a community, the primary interest is in the overall coverage of an area, and probabilistic results can be meaningful. In the context of SHVA, however, which expressly makes eligibility turn on the presence or absence of a signal at the specific location of the household in question, probabilistic predictions of area coverage are not useful. To be useful, a predictive model must predict the signal at the specific location of the household which wishes to receive satellite service.

This distinction is not merely theoretical. Particularly in areas of irregular terrain, television broadcast signal strength can vary dramatically over relatively short distances. Thus, for example, if one attempts to use the Longley-Rice model in the area-prediction manner promoted by the broadcast interests to define so-called "white" or "red" areas, by defining "cells" 800 meters on a

side, calculating the signal strength at the center of the "cell," and assigning that value to all locations in the cell, see Biby Testimony, pp. 856-857, one can err by as much as 20 dB — that is, the actual signal strength at a household in the cell can be as much as 20 dB below the signal strength calculated for the cell by the Longley-Rice model. See Biby Testimony, p. 860. This is far too great a variation to be acceptable; hence the predictive model must be used to generate a prediction at the specific location of the household at issue.

4. The Commission May Choose From Several Different Models.

The Commission is not limited to any one particular model. PrimeTime 24 recognizes that the SBCA and perhaps others will be proposing that the Commission approve the TIREM model for use as the presumptive predictive model for SHVA purposes. The Commission may very well wish to adopt that model. Rather than duplicating the SBCA's work, PrimeTime 24 has chosen to address herein the Longley Rice model, recognizing that the Commission may wish to adopt a variation of that model. If it does adopt Longley Rice, however, it must pay particularly careful attention to the parameters used in the model. See Biby Testimony, p. 856 (Longley-Rice model as used by Jules Cohen for NAB is not reliable predictive tool), Biby Rebuttal Expert Report, pp. 3-4 and Exhibits A, B thereto (maps with more appropriate parameters are better-suited to task), Biby Testimony, p. 878 (maps showing morphological effects are "an enormous step in the right direction").

5. Only Point-to-Point Calculations Are Appropriate

Whichever model is chosen, it is clear that the model must be used, not to generate maps defining generalized areas of coverage, but to calculate the predicted signal strength at the specific location of the household in question. In view of the strong variation in signal intensity due to

terrain features which is possible over even very short distances, only a calculation made using the actual location of the household can be relied upon. See Biby Testimony, pp. 829-837.

Fortunately, it is possible to perform such calculations relatively conveniently. Potential subscribers can be asked their street address, and computer programs are freely available which determine latitude and longitude for a given street address.

6. The Model Must Assume a Realistic Receiving Antenna Height.

One of the input parameters in the Longley-Rice model, of course, is the height of the receiving antenna; this is a significant variable because in general the intensity of a broadcast television signal decreases sharply as one descends toward the ground.

For purposes of area prediction, the Commission has frequently utilized a 30' receiving antenna height. This is reasonable for such a purpose; many homes are two stories in height, and an antenna on such a home might well be 30' above the ground. Moreover, the use of a single defined height assures that predictions can be compared to each other, without the need to compensate for differences in the height of the assumed receiving antenna.

For purposes of determining the eligibility of a particular household for SHVA purposes, however, the use of a uniform 30' antenna height clearly cannot be permitted. The Satellite Home Viewer Act makes the eligibility of a household depend on whether that particular household is capable of receiving the signal of Grade B intensity with a conventional outdoor antenna. But, unless unconventional methods are used, such antennas can only be elevated about 5' above the household roof. Therefore, if the house is one story in height, and/or if it has a flat roof — and in many locations in the United States a majority of homes are so built — the antenna will more likely be at 20' than 30'. Testimony of Robert Culver (hereinafter, "Culver Testimony"), pp. 654, 657

(Exhibit B hereto) (no homes observed in Missoula market had antennas at 30'). The Commission should not disenfranchise those who live in such houses; it therefore should specify that when the Longley-Rice model is used to calculate the presumptive eligibility of a household, it should be assumed that the receiving antenna is 5' above the actual height of that household's roof. If the Commission believes this impractical, then, it should require conservatively that the household antenna be assumed to be 20' above the ground, not 30'. See Biby Testimony, p. 865; Affidavit of Richard L. Biby (hereinafter "Biby Affidavit"), p. 2.

7. The Model Should Take Into Account the Presence of Buildings and Vegetation in the Vicinity of the Receiving Household.

It has long been recognized that television reception at any given location may be strongly affected by local features such as buildings and trees that may obstruct the direct propagation of the signal to the receiving antenna. See Biby Testimony, p. 870 (Longley expressed concerns about effect of vegetation on signals). The effect of these obstructions can be a decrease in signal strength of between 10 and 30 dB over a distance as short as 30' to 40' at low VHF, and over even shorter distances at higher frequencies. Biby Testimony, pp. 831-833, 872.

When the Longley-Rice model is used to make generalized area predictions, it may be appropriate to ignore such features, because their effect is so localized. However, when the entire purpose of the exercise is to determine the intensity of the broadcast signal at one specific location, features in the near vicinity of that location that may have a strong influence on the received signal cannot any longer be ignored; their effect may dominate. See Biby Testimony, p. 865.

Unfortunately the standard Longley-Rice model does not take vegetation or buildings into account at all; it assumes that the receiving antenna is located on a barren expanse of land where

nothing whatever protrudes above ground level. Biby Testimony, p. 833. In order to overcome this deficiency, the Commission should require that anyone carrying out a prediction of SHVA eligibility using the Longley-Rice model add to that model a method of taking into account the effects of buildings and vegetation. See Biby Testimony, p. 872 (Jules Cohen, testifying for the NAB, agreed that it would be preferable to take buildings and vegetation into account).

One methodology of which PrimeTime 24 is aware has been developed by Richard Biby. It is known as the "Biby C" model, and it permits the user to add to the Longley-Rice model a correction for the actual buildings and vegetation found in the vicinity of the household in question. This methodology is well-known in the industry, including to the Commission, it is widely used, and it is based upon substantial empirical data. See Expert Report of Richard L. Biby, p. 3, Biby Testimony, pp. 870-871. It is therefore fully appropriate that its use will be permitted.

The Commission may be aware of other methodologies as well; PrimeTime 24 would not oppose their use if they were determined to be as accurate as the "Biby C" method.

8. The Model Used Should Take Into Account the Potential Error Introduced When the Model Reports An "Error Code" For a Calculation

It is widely recognized that the Longley-Rice model does not properly deal with situations where it is being asked to perform a calculation under circumstances where its underlying algorithms and assumptions are no longer accurate representations of the actual signal propagation that is occurring. See Engineering Statement of Hatfield & Dawson.

The developers of the model recognized as much, and did not claim that their model's calculated results were always accurate; they carefully defined an "error code" that was designed to warn the user of the model when the calculated results could not be trusted, usually because one or

more parameters in the calculation was out of range. Unfortunately, users too often have disregarded this error code, and have blindly utilized the result of the calculation regardless. This result may have some justification where only generalized area results are of interest, since the particular result at one single location in an area where an error code may be occur is relatively unimportant. But when the purpose of the model is to determine the signal strength at a particular location, and the model calculation results in an error code at that very location, it would be improper to ignore the error code and declare the household ineligible if the meaningless model calculation happened to exceed the Grade B value; the only appropriate result in cases where an error code occurs is to declare the household eligible.

9. The Model Should Take Into Account Co-channel and Adjacent Channel Interference

In much of the United States, the ability of households to receive a given television broadcast signal is limited by interference phenomena. In view of the fact that the Longley-Rice model is capable of calculating whether or not such phenomena are present at a given location, there is no reason why the Commission should not require that such calculations be done. See Biby Testimony, p. 864 (NAB Longley-Rice maps did not consider interference), Biby Expert Report, p. 10 (interference should be taken into account).

10. The Commission Should Require that the Model be Used With a Requirement of a 95% Locational Probability and A 95% Confidence Level

No model can predict the television broadcast signal to be received at a given location with absolute certainty. The variables which affect signal propagation simply are too numerous, and the uncertainties too great, for that to be possible. Rather, even the most complex model can only

produce a probabilistic result; it can predict the probability that a particular signal is received at a particular location, a particular percent of the time, with a specified confidence level. See Biby Testimony, p. 811.

In utilizing the Longley-Rice to predict the eligibility of a particular household for SHVA purposes, it is critical that these limitations in calculational accuracy be taken into account.

In view of the overall limitations inherent in attempting to predict something as complex as the atmospheric propagation of television broadcast signals, the Longley-Rice model includes as one overall parameter the statistical confidence level the user would like to attach to the result of the calculation. Biby Testimony, p. 813. For many purposes, a 50% confidence factor is utilized. It is important, however, to recognize that such a factor is not appropriate in the context of an attempt to determine whether a signal of Grade B intensity is present at a particular location. After all, it is conventional in reporting the results of experiments to require that a 95% confidence level be required before a result is considered statistically significant or valid; a 50% confidence level is never considered appropriate as the basis for reporting a result. See. e.g., Biby Testimony, p. 839 (NAB statistical expert used 95% confidence level). The same level of confidence should be required before a statistical prediction such as one made by the Longley-Rice model is used to disqualify a household from receiving network television broadcasts by satellite.

By the same token, the Longley-Rice model recognizes the rapid variation in signal strength over short distances, and the impossibility of predicting the signal strength at any given location with precision, by associating a "locational probability" with every calculation result. That probability reflects the fact that, even in attempting to calculate the signal strength at a specific location, the model necessary falls short; the best it can do is predict that a signal of the desired strength or greater

is present at a specified percentage of the points in the immediate vicinity of the location in question. See Biby Testimony, pp. 811-812.

Given this uncertainty, and again recognizing the conventional practice of requiring 95% confidence before accepting a result as statistically valid, the Commission should require that the model be used with the requirement that a 95% locational probability be required for any result that predicts that a signal of Grade B or greater intensity is found at a given household. See Biby Testimony, p. 869 (NAB use of 50% locational probability improper).

The Commission will recognize that there is a third statistical parameter associated with the Longley-Rice model's calculations. In view of the rapid and unpredictable variation in signal strength over short periods of time, the model requires that the user specify the "temporal probability" that is to be used in the calculation; that is, the percentage of time the signal is to be greater than the desired value. While PrimeTime 24 believes the other statistical parameters should be set at 95%, it does not believe that the temporal probability should be; it accepts the use of a 50% parameter here.

The reason is that there already is built into the planning factors in the definition of Grade B a factor to ensure that an acceptable picture will be present 90% of the time, if the Grade B signal intensity is present 50% of the time. See, e.g., Hassinger Decl., ¶ 15. Bearing in mind that the underlying purpose of defining a signal of Grade B intensity for SHVA purposes is to ensure the receipt of an acceptable quality picture, it would be "double counting" to require that the signal be present 95% of the time; PrimeTime 24 therefore accepts the use of a 50% parameter for the temporal probability. (To be sure, this results in an overall 90% temporal confidence level, not a 95% level. However, it would be unduly complicated to adjust the Longley-Rice model temporal

probability by just the right amount to produce an overall 95% probability of receiving an acceptable quality picture, given the 90% factor built into the definition; PrimeTime 24 therefore does not object to the slight inaccuracy this simplification introduces.)

11. The Use of These Parameters Will Permit Many Households Who Cannot Now Receive An Acceptable Picture Over the Air, But Who Are Now In Jeopardy Of Losing Their Right to Receive Network Programming By Satellite, to Retain Their Eligibility For Such Programming

PrimeTime 24 recognizes that the Commission has not embarked on this Rulemaking exercise simply out of curiosity; it is obviously motivated by the outcry that has resulted from the clumsy and blundering preliminary injunction that the District Court in Miami has entered, which threatens to deprive many deserving households of their only access to network programming. The parameters PrimeTime 24 proposes be used in the predictive model do not take into account all of the real-world factors which degrade picture quality, and therefore do not permit all deserving households to retain their eligibility for receipt of network programming by satellite. Nevertheless, those parameters do substantially improve the situation. See Biby Testimony, p. 878 ("an enormous step in the correct direction").

Attached hereto as Exhibit C is a map which illustrates the impact of adopting the Longley-Rice model with the parameters specified above, for one high-VHF station (WTVD Raleigh-Durham). The map illustrates the shrinkage in the presumptive area of eligibility when one moves from the unrealistic parameters used by the Florida court (50%-50%-50% probabilities, 30' antenna height) to the more realistic parameters discussed above (95%-50%-95%, 20').¹⁰

¹⁰ Because the company used to generate the map, DataWorld, does not have the
(continued...)

Exhibit A assumes, for purposes of illustrating only the effect of changing the parameters, that the Commission does not change the existing dB values in the definition of Grade B. However, as discussed above PrimeTime 24 strongly believes that the values are obsolete and must be substantially increased to reflect reality. Exhibit B therefore is designed to illustrate the effect of applying the same parameters, using the conservatively updated Grade B values proposed by Mr. Hassinger in his Declaration.

Of course, people's homes are not scattered uniformly over the geographic area covered by a station's signal; they tend to be clustered toward the center of the metropolitan area. It is important therefore to consider not just the geographic impact of choosing the correct parameters, but the impact on people. Exhibits E-H therefore contain tables for representative stations in each of four Designated Market Areas -- WCBS New York (low VHF), KTTV Los Angeles (High VHF), WPGH Pittsburgh (UHF), and WTVD Raleigh-Durham (high VHF), comparing:

(a) the number of people who would be disqualified by the Miami federal court preliminary injunction from receiving network programming by satellite, because the Longley-rice model used as the NAB would use it (50% probabilities, 30' antenna height, current Grade B values) predicts that they are "served";

(b) the number of people who would be disqualified if the location and confidence probabilities were increased to 95% [and the height decreased to 20'], holding the Grade B value and temporal probability constant;

¹⁰(...continued)
capability of including the effects of buildings and vegetation, the map does not illustrate the impact of this correction.

(c) the number of people who would be disqualified if the Grade B level was updated, even at 50% probability values; and

(d) the number of people who would be disqualified if the Grade B value were updated, and a 95% location and confidence probability used.

D. The Commission Should Define a Testing Protocol Which May Be Used To Definitively Determine Eligibility For Satellite Home Viewer Act Purposes In The Event A Household Or A Station Wishes To Question The Predictive Model's Result In a Particular Case.

No predictive model can be 100% accurate. It is essential that the FCC define a testing protocol that may be used to determine eligibility for SHVA purposes in the event a household or a station wishes to question the predictive model's result in a particular case.

The Congress recognized when it adopted the Satellite Home Viewer Act that there was no established methodology for testing that was appropriate for SHVA purposes; it desired that the parties agree upon such a methodology. Because no such agreement could be reached, however, it is essential that the Commission exercise its authority to make this determination.

1. The Protocol Should Not Be That Specified In Section 73.686 For the Purpose of Area Coverage Determination

When the Commission defined a testing protocol in Section 73.686 of its Rules, it did so for very limited purposes. Indeed, Section 73.686 explicitly provides that the results of measurements taken by these methods are only to be used for purposes of determining whether a community receives a given grade of service. Biby Testimony, pp. 801, 805; Culver Testimony, pp. 622-624. Nor is this surprising. The methods of Section 73.686 are specifically tailored to such determinations.

The use of a 100' run, for example, assures that the result obtained is not the signal that which

will actually be observed at any specific location, but rather is the average signal obtained in that vicinity. This makes perfect sense when the purpose of the exercise is determination of area coverage, and indeed when that measurement is only to be used as part of a series of measurements taken across a grid, as Section 73.686 specifies. Culver Testimony, p. 623; Biby Testimony, pp. 801-802, 805. But it makes no sense to do a single, isolated 100' run when the purpose is the determination of the signal strength at a single specific location.

By the same token, the specification that the receiving antenna be maintained at a 30' height may be perfectly appropriate when the purpose is to determine the general area in which a signal may be present, but makes no sense when the purpose is to determine whether the signal is present at the location of a particular household's rooftop antenna, which may be at a very different height. See Biby Testimony, p. 865, Biby Affidavit, p. 2.

Finally, the requirement that the receiving antenna be oriented toward the station in question for maximum signal reception may be appropriate when the issue is to determine the signal strength present in an area, but is inappropriate where the issue is the ability of a specific household to receive the signal with a conventional rooftop antenna. Because a conventional rooftop antenna does not include an rotor, and because in many cities different stations transmit from different locations, households in reality often have to orient their receiving antennas in compromise directions to assure the best reception from a range of stations.

In sum, there is currently no testing methodology which the Commission has approved which is suitable for SHVA purposes. See Biby Testimony, p. 810.

2. The Commission Should Require That Measurements of Signal Strength For SHVA Purposes Be Made At A Specific Fixed Location As Close As Possible To The Household In Question, Not On 100' Runs On Public Roads.

In order to determine the signal intensity at the location of a household, the Commission must specify that the measurement be made as close as possible to the house involved as possible, in view of the dramatic variation in signal strength that is possible over even short distances. Biby Testimony, pp. 829-837 (10 to 30 dB variation over very short distances). Ideally, the measurement should be made immediately adjacent to the house, on the driveway, in order to be sure that the measurement is made as close to the site of the antenna as possible. If that is not possible (for example, because the homeowner refuses to grant access to his or her property), the Commission should at least require that the measurement be made on a public road as close to the home as possible. 100' runs only serve to increase the distance from the measuring apparatus to the household and therefore the potential error. Culver Testimony, p. 650. They should not be permitted.

3. The Testing Protocol Should Place The Antenna 5' Above The Roof Of The Household Being Tested, Not 30' Above the Ground

The Satellite Home Viewer Act does not refer to the presence of a signal of Grade B intensity at some arbitrary height above the household; rather, as discussed above, it refers to the ability of the household to receive the signal with a conventional antenna. Under the circumstances, the only meaningful measurement to determine eligibility is one made at the height where the household could locate such an antenna. See Biby Testimony, p. 865, Biby Affidavit, p. 2. In some instances this may well be 30', but it will not always be so. In many parts of the country many or most houses are a single story, and have a flat or only very slightly pitched roof. See, e.g., Culver Testimony,

pp. 654, 657 (none of houses observed in Missoula market had antennas as high as 30'). The best way to assure appropriate measurements are made, given the variety of home styles that may be encountered, is to require that the measurements be done at a height where a household actually could locate an antenna — 5' above the roof of the house — rather than at any particular arbitrary height. See Biby Testimony, p. 865.

4. The Testing Protocol Should Not Orient The Antenna So It Points Directly At The Transmitter Of Each One Of The Stations Being Tested

It has already been pointed out above that there can be no justification for requiring that the test antenna be oriented directly towards the station whose signal intensity is being tested; because conventional antennas do not have rotors, and because television transmitters in a given metropolitan area may be located in very different locations, a homeowner may well need to orient his or her antenna in a compromise direction. It follows that the test protocol should direct that the test antenna be oriented in the same direction as the household antenna.

5. The Testing Protocol Should Determine The Signal Level That Will Be Present At Least 90% Of The Time, Not the Median Signal Level

Signals vary substantially in strength over relatively short periods of time. Biby Testimony, pp. 833-834. A measurement made at one moment therefore will not definitively determine the signal strength at any other moment. Thus, in any testing protocol it defines the Commission must define how this variation is to be taken into account.

A household that is tested to receive a signal of Grade B intensity 51% of the time cannot be said to be able to receive that signal for purposes of SHVA; Congress could not have intended to make such a household ineligible for satellite delivery of network services. It follows that the Commission cannot simply provide that the median signal strength measured should be taken as the

signal intensity received at that location for purposes of determining SHVA eligibility; such a definition would disqualify many households who in fact can only receive a Grade B signal a portion of the time. Rather, the Commission should require that the signal be received at least 90% of the time before it is permissible to conclude that that location receives a signal of Grade B intensity sufficient to satisfy SHVA.

6. If The Household Has A Working Antenna And Signal Strength Measurements Inside The Household Are Possible, Then Such Measurements Should Be Made At The Receiver Terminal

No measurement made with a test antenna near the household in question can be perfect. There will always be the potential for a substantial variation in signal strength between the test antenna location and the household antenna location. See Biby Testimony, pp. 831-833 (10 to 30 dB variation possible); Biby Testimony, pp. 834-837 (measurements made by Jules Cohen for NAB show just such a variation); Culver Testimony, p. 650. Thus, it would be more accurate to measure directly at the rooftop. Biby Testimony, pp. 852-853.

In addition, the use of a test antenna itself introduces an unrealistic element. In the real world, household antennas will degrade over time as they are exposed to weather. Both of these problems could be overcome if the measurements to determine eligibility were made with the household antenna. Biby Testimony, pp. 853-854.

To be sure, that may not always be possible. The homeowner may deny access to the property, or may lack an antenna, or may have an antenna that obviously is improperly connected, or so out of repair as not to be functional. In such cases, the test must be carried out with the test antenna. However, if the homeowner is cooperative, and has a working antenna, the Commission should specify that that antenna should be used for the test, in order to obtain the most realistic

answer possible to the question of whether that household is capable of receiving a signal of Grade B intensity by means of a conventional rooftop receiving antenna.

E. The Commission Should Follow Policies Designed to Protect Consumers.

In the NPRM, the Commission recognizes two principal policy goals: (1) "to ensure that as many consumers as possible can receive a broadcast network signal consistent with the intent of the SHVA" and (2) "to promote competition among multichannel video programming distributors." NPRM, ¶ 15. These are appropriate goals under SHVA and the communications laws for which the Commission is responsible for implementing. Both of these goals counsel in favor of a liberal, or consumer-friendly, definition and application of the unserved household provision in SHVA. At the same time, the Commission "recognize[s] the important role that local broadcast stations play in their communities," *id.*, and it seeks comment on how a more liberal application of the unserved household provision would affect its policy of promoting "localism."

At the outset, it should be emphasized the principal purpose of the Satellite Home Viewer Act was to provide access to network programming to satellite dish owners. See H.R. Rep. No. 100-887, pt. I, at 8 (1988) (House Judiciary Committee statement of purpose of legislation), *reprinted in* 1988 U.S.C.C.A.N. 5611; Report, In the Matter of Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming, 5 FCC Rcd 523, ¶ 11 (1989) ("In clarifying the rights and responsibilities of satellite carriers, the primary purpose of this compulsory license is to assure the availability of ... network stations to home dish owners.").

Moreover, as the accompanying declaration of economist James Dertouzos makes clear, a less restrictive eligibility standard will not undermine the goal of localism, for several reasons. First, insofar as an eligibility standard merely permits viewers of distant network signals to watch

network programming that they would not otherwise have watched over-the-air because of inadequate picture quality, then there is no effect on network affiliates at all. And, indeed, Dertouzos conducted an econometric study which demonstrates that PrimeTime 24, when using an eligibility standard based on asking subscribers whether they received acceptable over the pictures, had no measurable effect on network station ratings. Declaration of James Dertouzos, ¶¶ 6-7. Second, as Dertouzos points out, even if affiliates were to suffer losses in viewers, it is extremely unlikely that the viability of network affiliates would be affected. The average network affiliate earns huge returns (cash flows exceed 40% of net revenues) that significantly exceed those earned by independent stations.¹¹ Moreover, as Dertouzos argues, the logic for protecting network affiliates from assumed competition in order to promote localism is inherently flawed. Higher profits for network affiliates do not translate into more local programming.¹² Indeed, competition would enhance -- not diminish-- the policy goal of increasing flows of local information, news, and entertainment to communities. This is because local stations, faced with assumed greater competition (from satellite providers) in the provision of network fare and other "general interest" programming, would have greater incentives to invest more in programming, and particularly local programming. Id., ¶ 5. In other words, a predictable competitive response would be for the local affiliate to carry

¹¹ The average affiliate of one of the three networks ABC, CBS, and NBC had a cash flow of over \$7.6 million on a net revenue base of \$18.4 million in 1995. For independent stations, the average percentage was 1/3 less, at 31%. See Dertouzos Declaration, ¶ 4 n.1. As Dertouzos notes, "must-carry" requirements have not been adopted out of concern for network affiliates. Rather, they are designed to protect a smaller number of marginal independent stations that could fail in the absence of carriage by cable operators. Id.

¹² In fact, network affiliates currently produce very little local programming, especially during prime time. For example, the average station affiliated with a network spent a mere 3.7% of its total expenses on production (1996 *Television Financial Report*, National Association of Broadcasters).

more and higher quality content of community interest.

In sum, unless localism simply means protectionism for network affiliates, localism will not be undermined by liberalizing consumer access to network programming by satellite.

F. The Commission Should Not Speculate About the Impact its Decision Will Have on Existing PrimeTime 24 Subscribers.

As the NPRM makes explicit, both this rulemaking proceeding and its expedited timetable were precipitated by the preliminary injunction entered in the Miami federal court case against PrimeTime 24, now scheduled to become effective on February 28, 1999. See, e.g., NPRM at 6-8. Chairman Kennard has aptly characterized the preliminary injunction as "an impending 'train wreck' that need not occur." September 4, 1998 letter from Chairman Kennard to Senator McCain and Congressman Bliley.

The very purpose of this proceeding, therefore, is for the Commission to define (for the first time) what it means to be able to receive "a signal of Grade B intensity" through "a conventional outdoor roofing receiving antenna" for purposes of SHVA, before the Miami court's injunction become effective. This will enable the parties and the court in the Miami case to take the Commission's rule into account before any existing subscribers have any satellite network service terminated.

PrimeTime 24 applauds the Commission for bravely filling this regulatory void at this critical juncture. At the same time, however, PrimeTime 24 believes it was inappropriate for the Commission to make any observations in the NPRM about the likely impact that any rule it promulgates may have. In the NPRM, the Commission remarked:

we do not appear to have the statutory authority to prevent most of PrimeTime 24's subscribers from losing their network service under the Miami preliminary injunction

(and under a possible permanent injunction). The evidence in the Miami ... court case [] strongly suggests that many, if not most, of the subscribers do not live in "unserved households" under any interpretation of the term.

NPRM at 10. Presumably, the "evidence" the Commission was referring to consisted of certain maps which purported to superimpose the locations of PrimeTime 24 subscribers on areas predicted to receive adequate over-the-air service.

With all due respect, these comments were misplaced. In the first place, the Miami court has only entered a preliminary injunction. In doing so, moreover, the court relaxed the evidentiary standards that would govern a trial. 9 F. Supp. 2d at 1341-42. The trial in the Miami case was held in August, 1998, and no decision has yet been entered. At that trial, both the admissibility and probative value of the so-called "evidence" alluded to in the NPRM were fiercely contested. How the trial court (or any appellate court) ultimately will choose to treat this "evidence" is not known. Thus, it was at best premature for the Commission to offer its impression of the "evidence" in the Miami case.

Further, all that the purported "evidence" shows, if it is to be deemed admissible and credited (which it should not be), is that certain PrimeTime 24 subscribers live in areas where a particular version of the Longley-Rice model predicts that a certain percentage of households will receive a certain signal strength a certain percentage of the time with a 30 foot antenna. This probabilistic "evidence," by its very nature, cannot and does not show whether the subscribers in question are among those in the area who are predicted to receive or not receive the signal. In addition, predictions are just that, and issues of probability aside, they are not always accurate, as the Commission knows.

This is neither the time, nor the place, for PrimeTime 24 to argue the merits of the Miami

case. By the same token, the Commission should decline any further comment on the "evidence" in the case. The Commission's role is to promulgate a rule that defines what it means to be able to receive "a signal of Grade B intensity" through the use of "a conventional outdoor rooftop receiving antenna," as those terms are used in SHVA. It will then be for the courts and the litigants, and perhaps the Congress, to work out which subscribers, if any, are to lose network service as a result of the Miami case. The Commission should fulfill its function - - a highly valuable one - - and leave those other matters to the other branches of government.

To summarize, the statements in the NPRM regarding the "evidence" in the Miami case were institutionally inappropriate, and antithetical to the purpose of this proceeding. When it issues its rule, the Commission should place those statements in their proper perspective and not make any further observations about the likely impact of its rule on PrimeTime 24's existing subscribers. While the rule may figure prominently in the Miami litigation, the Commission has no basis for knowing which or how many PrimeTime 24 subscribers will be affected by it, and should make no suggestions in this regard.

G. The Commission Should Recommend That Congress Amend SHVA, At Least on an Interim Basis, to Provide that Served Households Be Allowed to Receive Satellite-Delivered Network Programming Upon Payment of a Fee to Compensate Broadcasters.

In the NPRM, the Commission noted that SHVA "limits the proposals" the Commission can adopt to protect satellite subscribers and promote competition among multichannel video programming distributors. NPRM at 10. Assuming that to be true, then the Commission should propose that Congress make amendments to SHVA that will foster the goals of consumer choice and

create viable competition to cable television.¹³

In the NPRM, the Commission specifically solicited comments regarding “the prospect that the [satellite] industry will develop ‘local-into-local’ technology to serve every community,” and more particularly, “on a time frame for implementing this possible solution to the demands for satellite delivery of network station signals.” NPRM at 22. PrimeTime 24 is not in the “local-into-local” business as such; it instead uplinks, and its distributors offer on a nationwide basis, one set of east coast signals for ABC, CBS, and NBC, one set of west coast signals for ABC, CBS, and NBC and the national “Fox Net” feed. PrimeTime 24 is therefore not as well positioned as other commenters may be to predict when, if ever, “local-into-local” service will be available in every community. One thing, however, is clear: “local-into-local” service is not now available in most communities. Even its principal proponent, EchoStar, assuming it consummates the recently announced transaction with News Corp., apparently only hopes to offer “local-into-local” service to at most 55 of the over 200 television markets in the country. See “Ergen Ups Local TV Ante,” *Broadcasting & Cable*, December 7, 1998. Whether or not Echostar or anyone else ever succeeds, in whole or in part, with a “local-into-local” strategy - - and such a strategy, even without “must carry,” may not be technologically or economically feasible in many markets - - “local-to-local” is plainly not a viable near-term option.

¹³The Commission routinely submits Reports to Congress regarding its legislative recommendations. See, e.g., Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report, 11 CR 147 (January 13, 1998). The Commission has received significant correspondence from members of Congress on this subject. See NPRM, ¶ 13, n. 30-32. Accordingly, PrimeTime 24 respectfully requests that the Commission develop a record in this proceeding as to those issues and matters which the Commission determines require a legislative solution and provide the record and the Commission's recommendation to the Congress for its consideration.

Accordingly, were Congress to amend SHVA to permit "served" households to receive "local-into-local" network programming via satellite, in order to foster competition to cable, that would accomplish relatively little in the short-run. In these circumstances, the Commission should take the following course of action: First, define what it means for a consumer to be able to receive "a signal of Grade B intensity" through "a conventional outdoor rooftop receiving antenna" for purposes of SHVA, so as to distinguish "served" from "unserved" households; and second, propose that Congress extend SHVA, and also amend SHVA, at least on an interim basis, to permit "served" households to receive distant network programming, upon payment of a fee (above and beyond the current statutory copyright royalty fee) to compensate the broadcasters for the theoretical loss in advertising revenue that would be occasioned by the theoretical loss in viewers.¹⁴ Adopting such a regime, pending developments concerning "local-to-local," will serve two important purposes: allowing consumers to choose how they receive their network programming; and enabling the nascent satellite industry to become a force capable of competing with the cable monopolies.¹⁵

PrimeTime 24 is not alone in sponsoring such an initiative. Indeed, the Copyright Office proposed a similar approach in its August 1, 1997 "A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals." At pages 129-31 of its Report, the Copyright Office

¹⁴ Of course, as explained above, there is reason to question whether these theoretical losses really would occur. See Dertouzos Decl., ¶¶ 6, 7.

¹⁵ As economist James Dertouzos notes, "Insofar as some households that are served by local affiliates would prefer to view a distant network, restricting those households' ability to obtain preferred programming is unequivocally inefficient. By charging a subscription fee that reflects the incremental value of that programming to that household and compensating the broadcasters for any lost advertising revenue, it should be possible to make everybody better off, including subscribers, satellite operators, networks and their local affiliates." Dertouzos Decl., ¶ 8.

proposed a temporary "Surcharge Option" under which presumptively ineligible households would be able to receive network programming via satellite by incurring an additional cost.

PrimeTime 24 believes that the Commission should endorse this type of approach, and propose that it be enacted by Congress. An FCC definition of what it means be able to receive "a signal of Grade B intensity" through "a conventional outdoor rooftop receiving antenna," and an interim legislative adjustment that permits households defined as "served" to still obtain satellite delivered network programming upon payment of an additional fee, would give the satellite industry - - and the American public - - a fighting chance of successfully combating the cable companies' current stranglehold in the multichannel video marketplace.

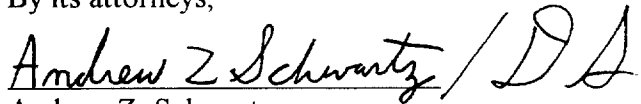
III. CONCLUSION

This is, at its core, a consumer issue. Eligible consumers want to receive network programming via satellite. The ability of DTH program distributors to provide network programming is critical to their continued competitiveness with cable in the video marketplace. The misuse and misapplication of the Commission's existing regulations and the Longley Rice model by the broadcast industry is now threatening to prevent the delivery of network programming by satellite and blunting the developing satellite industry's competitive thrust. Accordingly, the Commission should adopt the proposals set forth above to protect the interests of millions of television viewing households across the country.

Respectfully submitted,

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